APPENDIX.

(171) ORAL OPINION OF DISTRICT COURT.

(Rendered September 1, 1966.)

We have here an indictment on the part of the Government against Donald Smeltz Butler in which the Grand Jury charges that on or about February 4, 1964, in the Northern District of Ohio, Eastern Division, Donald Smeltz Butler, a person required and ordered to serve in the Armed Forces of the United States under the Universal Military Training and Service Act, as amended, did knowingly fail to report for induction into the Armed Forces of the United States after being so ordered by Local Board (172) No. 11, Carrollton, Ohio, in violation of Title 50 Appendix, Sections 456, 462, United States Code.

From the evidence, it appears to me that this Defendant enjoys a rather splendid job which is, to some degree, under Government auspices, and which is as closely related to the country's defense as any job could very well be. He profits daily by such employment.

He does not have the objection to military service which is so often raised before our courts, namely, that such employment by him would save someone else for military duty. Religion does not enter into his objection in any way. As he has said in writing, he has no complaint with reference to any of the processes under the Selective Service Act, except that he questions the Government's right, under this law, to draft him into military service, claiming such law to be unconstitutional.

For many years, he took every possible advantage of those provisions of the Act which granted him deferments from military service. For years, he used one ground or another to defer and to delay service, until he has attained (173) the age of 26. During these eight years, he never raised a question about his coming under the Act or

about the unconstitutionality of the Act. He never questioned any legal authority of the Selective Service over him: he merely advanced his many claims over this eight-year period to the effect that his military service ought to be deferred until his education would become more complete.

During this time, he got more and more education, and he took a lot of time to get it. He also worked at this Government job. Apparently he was skilled in research pertaining to molecular functions with reference to rockets, space craft, et cetera, from a scientific viewpoint.

During these eight years in which he sought and obtained these many deferments, he was very polite and courteous with all the representatives of the Selective Service agency of Government, and they were most deferential, to say the least, with him.

As a coincidence,—it really appears as if when he reached the age of 26, that magic age beyond which inductions are less frequent (174) as a matter of policy, but not as a matter of law, his personality seemed to undergo a very sudden and rather complete change. All his politeness came to an end. In his writings, he suddenly became very bold and contemptuous, both toward the Selective Service System and to the country itself. On January 12th he starts to explain—it is one of the exhibits here—he writes to the board and says: "You probably have assumed that I would support the Selective Service System if I were called upon to do so. It is true that I have never indicated otherwise. For this deception I am truly sorry; for if called upon *I would not* comply with the wishes of the Selective Service System."

This becomes a sort of a declaration of independence on his part. The next paragraph relates:

"I have not for a long time agreed with the principle

of involuntary military service and that is still my feeling. That you have not known this is my fault. It was at my consent and planning that this deception existed. This deceptive planning, I am ashamed to say, even extended as far as to my purposely obtaining a (175) low score on the Cleveland tests. I am a draft dodger, of that I am proud, that I did not make it known, that only do I regret."

Of course, I don't think he regretted it with sincerity. I think he did not make it known because he knew very well that if he had made it known, he would have been inducted into the service. So, as I say, he writes a letter really to express his contempt for the Government and the country. Continuing:

"My disagreement with involuntary service is not made on any religious basis. It is based on a love of freedom and a hatred of dictatorship. And my belief is strengthened as the dictatorship is strengthened. So when a dictatorship is so powerful as to decree the life and death of thousands,—rather millions of people it has truly earned my disgust."

Now in reading this letter, the Court asks itself, "Well, is he calling us a dictatorship?" And the next paragraph helps to decide:

"Our military has this power and it has my disgust. But our military has not ended its dictatorship at choosing the life and death of people; it has, in the Selective Service (176) System the legal power of assigning the executioners. And they dictate the terms under which one may be spared this fate. It is a complete dictatorship for those under its domination. For this reason I refuse to accept such domination."

So what he is saying is: our country is a dictatorship and the Selective Service is part of a dictatorship, that is why he refuses to accept the domination of such a terrible dictatorship. Continuing:

"There are, of course, many undesirable dictates of the Selective Service. That the Selective Service should have the power to influence marriages, families, and occupations is unreasonable."

Of course, one cannot help but make the observation that it has not interfered with him in any of those respects. And continuing:

"But that it also has the power over who shall kill and be killed is unjust.

"Now I realize that military service, voluntary or involuntary, does not necessarily call for killing. However *any military service does support killing.*

"And, it would seem that to have a person (177) killed, or to help in such an act, one should know just what is being lost with that life. But * * * I do not believe that I can judge the value of a human life. I do not believe that any military officer can evaluate a life's worth, and I do not believe that you—" meaning the Selective Service—"—are capable of such a judgment. And without such a judgment killing can only be done blindly. Killing blindly under orders then is something I cannot do as long as I believe in freedom. And I do believe strongly in freedom. If my death would help the cause of freedom I would gladly forfeit my life. But to kill is of itself a defeat of this cause.

"Therefore before I could support any killing a cause more important to me than the cause of freedom must be presented.

"Is patriotism such a cause?

"Let me say that it is not a good country because I was born here * * * It's a good country because I like it and it's a bad country because I dislike it. My patriotism is based on my belief and my belief is in freedom.

"Benjamin Franklin once said, 'Where liberty (178) dwells—there is my country.' "

So I cannot help but note that a country is good because this Defendant likes it,—and it has been very good to him: he has avoided service all these years; he has this splendid job, a fine position. For eight years, he has gotten out of duty imposed on so many others—many of whom are now dead. But it's a good country if he likes it; that is how he defines it. If he doesn't like it, then it isn't a good country. That is what he thinks of the country which has done so much for him.

Now, he goes on with another question:

"Are all the lives of the men who fought and died in World Wars I and II wasted because I will not follow their example?

"No * * * World Wars I and II were not wasted wars * * * those were not wasted lives *if* we learned something about that experience. But we would be wasting those lives if we should *only* repeat their actions and *not* attempt a better way of life.

"Will the label of coward turn me from my belief in freedom? If it takes a brave man to kill another, then I am a coward.

(179) "No, these causes will not sway my belief; so it is that I have no reason to agree with the Selective Service System, much less to comply with it. For as certainly as a strong America is a great ideal, a free America is a greater ideal."

Now, that letter was on January 12, 1963. Within a week, meaning January 17, 1963, he comes through with another:

"Betty—" he knows somebody in the Selective Service so well he calls her by her first name:

"First of all, I'm sorry I haven't sent you any word since you sent the last form to me."

He wants to be polite to her.

"Enclosed is a copy of the letter that I have sent to the draft board." Meaning the letter I just read.

"A letter like this is hard to write, perhaps harder yet to send.

"This letter will also explain why no form is enclosed with this reply.

"One item you may wonder about in this letter is the mention of a planned low scoring on the tests taken in Cleveland. I would have mentioned **(180)** this to you in December when we spoke, but truthfully I had forgotten about it."

Of course, truthfully, he hadn't passed his 26th birthday. Continuing:

"However, I couldn't help but feel your opinion of my truthfulness was undeserved on my part, but it wasn't until later that I remembered why.

"To make this clear, I am referring to the written tests given at the Cleveland physical. For someone who has spend the previous 15 years taking many various tests, the Cleveland tests were quite simple. Simple enough to not only find the correct answers but also to find reasonable sounding wrong answers. Therefore it was also quite easy to miss approximately one-third of the answers and to obtain a low score."

Really, here, he is bragging to Betty how dumb a man, as smart as he, could make himself appear to be. Continuing:

"This I did in the earnest hope of avoiding any influence of the Selective Service. And I was almost successful in this venture, as out of all the men there that day only five were left as possibly unfit. I was one of those **(181)** five * * * three of which *were rejected.* So you see, my deception was not only intended but almost effective. I am thankful now that I did not evade the Selective

Service on such devious terms. I doubt that I could long have been silent had I been successful. The reason for this I think you will find in the following letter."

Later, on October 31, 1963, in a form sent to him by the board, there is a paragraph which mentions to him his duty under the Selective Service, and the paragraph reads as follows:

"This questionnaire is provided as a convenience in performing—" and this is underlined—"—your continuing duty under the selective service law,"—that is the end of the underlining—"—to report changes in your status and mailing address to your local board. It is particularly desired that current information be presented—" this is underlined, now—"*promptly*,"—end of the underline—"—regarding the subject matter of any series of this questionnaire which may be checked. You may attach any additional information you believe should be brought to the attention of the local (182) board." And aside of this, he has written, "I have no such duty. D.B."

In other words, now they're safe, become real bright, bold, independent and contemptuous. Now they're safe.

This was his first indication to the Selective Service —after they gave him these many deferments for an eight-year period to the age of 26—first indication that his politeness was mere hypocrisy all this time.

Here he denies any duty, meaning any responsibility to the Board or the Government at all. And before me, he defends it all upon the claim that there is a lack of constitutionality in the legislation.

Of course, on the subject, there hasn't been a single case presented to me to that effect. So it does appear to me as if he thought, once he got past 26, that it was then safe for him to be less polite and gracious with the Selective Service than he had been. In actuality, he attacks the

authority from which he asked and received eight years of deferments.

Now, of course, we have heard him testify; had an opportunity of some observation of him (183) and a chance to see how bright he is. One cannot help but think, and believe, that he is surely bright enough to know that, with all his great intellectual attainment, no one would ever put a rifle and a bayonet in his hands. He is bright enough to know that the greatest probability—had he been called upon to serve, one of his capacity, history and occupation—would have been assigned where those capacities would have been utilized. He surely knew nobody would ever ask him to kill. But he decided to make a great big story out of the fact that he wouldn't want to hurt anybody.

My question is: did he hurt the country by violating this law? It looks to me as if he laid low for eight years; and then after he attained this magic age, he wrote this letter to the board, telling them of his hypocritical deception—

Mr. Rudd: Your Honor please,—

The Court: Be seated.

Mr. Rudd: I think your Honor is in misapprehension about some of the facts.

The Court: Be seated.

Mr. Rudd: Your Honor, I would (184) like to correct that.

The Court: You have had your say, and I have been patient with you for hours.

When a man says that he is proud he is a draft dodger in a letter to the Selective Service, then the one who is to judge his case—which, in this instance, is myself—must later very seriously consider whether his own evaluation of himself was not a true self-appraisal.

He calls himself a draft dodger—and he is proud of it. I have to call him the same thing—and I am ashamed to

have to call it to him—that a man with all his capacity would take advantage of the country, which he has done.

From his writings, he says he loves freedom, of which he has been the beneficiary these last ten years, largely because others who love freedom were willing to fight for it. They went to fight for his freedom.

From his writings, he says he hates the dictatorships which endanger our country, and which are held at bay by others who also hate dictatorships to the point where they are willing to fight against dictatorships to protect (185) against these dictatorships. But he really classes our country as a dictatorship, also.

He talks about World Wars I and II. In World War I, we lost 75,000 men in France: to stop a dictatorship.

In World War II, we lost 400,000 men: to stop a dictatorship. He calls us a dictatorship.

My question is: did he fail and refuse to report for induction? He says he did. On paper, he says he won't go. On some paper, he says he fooled people by taking deceptive tests. In other words, he lied in his answers, and bragged to this girl in the Selective Service about how he nearly fooled somebody; except that he was so smart, he really couldn't fool them. He really couldn't make them feel he was dumb because he was so bright—and apparently he is, in some sort of a way.

So I have to find he did fail and refuse to report for induction.

All I could see here is that this draft board was a lot more kindly and solicitous of him than has been the case in any one of these matters I have ever seen. I have never seen a case, in my 12 years in this building, where (186) any draft board was so solicitous over a man trying to get ahead, who really didn't need any more than he had. But he was always working for a degree, and he was always taking his time about getting it for fear he would get it

too fast; for fear he would get it before he was 26. So the board was most kind to him—and none of their kindness was appreciated or understood.

Here he deliberately refrained from going to the board to report for induction. The board was very meticulous about making sure he got his notice in the right way; because after they found out his real nature, they wanted to be meticulous about conforming with the law. He denies none of this. He just said, "Oh, the law is no good. It's against the United States Constitution."

So my first question is: did he fail to report, knowingly fail to report?

There isn't any question about that. He says so; and all the evidence is that he so failed. I doubt that there was ever a case in which knowledge was any better proved: he knew about his right to appeal classifications every time he received them, but he never chose to (187) appeal. He never appealed his I-A classification at any time; there wouldn't be any ground on which he could. He never claimed any unfairness to him administratively by the Selective Service Board rulings. He just let eight years go by during which he was learning German and a few other subjects, and taking his time about it until he hit the safe age of 26.

Now he falls back on the defense that the law is not constitutional. On that subject, he offers no decisions, no cases, no law, no authority whatsoever. The only proof his eminent counsel offers is the suggestion that other men in Congress, or otherwise, have declared themselves as either having a similar opinion or as having an opposition to the law. That is not proof in a courtroom. His eminent counsel has here offered no legal proof on this subject, except apparently that the wish is father to the thought. He does hope that some other court, some other day, will find that the Selective Service Act does deprive draftees

of their constitutional rights. He has a right to entertain the hope and to try to prove it. But, here, he offers not one decision of any court (188) anywhere in America. Of course, there isn't any.

I herein find that the Selective Service Act has not in any way deprived this gentleman of any of his constitutional rights, and I am constrained to find that he is herein guilty of the charge.

I will refer the matter to the Probation Department for a report; and I will ask his counsel, since the Probation Department has no representative here, to take his client upstairs and get started on such a report. To all of which, this Defendant has his objection and exception.

We will now adjourn until 2:00 o'clock this afternoon.

Mr. Rudd: Your Honor, there is a serious misapprehension with respect to the facts. I am afraid we will—

The Court: Let's stop right there and take your objection, and that will be that.

We will take our adjournment until 2:00 o'clock, Mr. Rogers.

(Thereupon Court was adjourned.)

(The following was dictated to the Reporter, (189) in the presence of Mr. Oakar, after the Court had left the bench:

Mr. Rudd: Mr. Reporter, let the record show that the Judge has left the bench, but that he advised me to state for the record what I conceive to be a misapprehension on his part with respect to the facts of the case, and that I now do.

The Judge stated that the letter from which he read, bearing the date of January 12, 1963, but received by the local board on January 21, 1964, as shown by the stamp that appears on the face of the letter, was written after the Defendant reached the age of 26. In this, there is a serious

misapprehension, because the Defendant was, at that date, only 25 years old.

Page 1 of the classification Questionnaire, Selective Service Form 100, as it appears in the file in evidence in this case, states his date of birth as March 29, 1938. I will point out that, no error with respect to that date having been suggested in the record, it must, therefore, be accepted as true.

Therefore, he would not have become 26 **(190)** until March 29, 1964, more than two months after this letter was received by the local board.

If my memory serves me correctly, he did testify that the date "January 12, 1963," as written on his letter, was in error, and that he meant "January 12, 1964," that being the date on which he drafted the letter; and he mailed it some days later, as shown by the date on which it was received by the local board. Thus, he was still short of age 26 by more than two months, and was not in any sense seeking to boast of or to crow to the board in triumph at having evaded service past the age of 26. He was, in fact, deliberately disclosing his attitude toward the draft and the mistake that he felt he had made in seeking to evade it by what he recognized, when he wrote the letter, as dishonest means; and was doing this at that time when he well knew, from the fact that he had received the Questionnaire, which he failed to return and which he mentioned in his letter, that he was subject to an order to report for induction.

One other minor misapprehension of the facts remains, and that relates to the marginal **(191)** note which the Judge said was later, that is, after the letter received by the board on January 21, 1964. In fact, that marginal note was returned on a Questionnaire that was mailed to him on October 31, 1963 and was received back by the

board on November 12, 1963, that being exactly two months before the date on which he wrote the letter the board received on January 21, 1964.)

* * * * *

TRANSCRIPT OF SENTENCING.

(1) The Court: Good morning, Mr. Rudd.

Mr. Rudd: Good morning.

The Court: I wish to explain something to you before I put the question to this young man. Back at the time when he was convicted for being unwilling to submit himself to the draft, we had a hearing for some days and I made a comment at the conclusion of the case to the effect that in this letter, which (2) he sent to the Draft Board saying that he was a draft dodger and proud of it, I made the remark that he sent it after he became 26 and when he felt safe. I was wrong in my date. He had sent it a couple weeks ahead of that, or a few weeks, maybe a month. But, of course, it makes no difference to the ultimate question of whether he is guilty or not of being a draft dodger.

Now, I am in the position where I must ask him and yourself, as counsel, whether he has anything to say as to why he should not be sentenced this morning for refusal to submit himself to the law with reference to the draft.

Do you have something to say on that, sir? You may say it.

The Defendant: Yes, your Honor, I have. What I would like to say is precisely the same argument that I held I was not guilty for the simple fact that I don't feel we have had a chance to present a very good case up to this point.

The Court: You had days in which to present it, sir.

The Defendant: I would like to say something at this time, if I may.

(3) The Court: I am asking you to tell me anything you can tell me as to why you shouldn't be sentenced this morning.

The Defendant: I honestly feel that the law I broke was unconstitutional and, therefore, not a law of this land. And as far as I am concerned, this is still true.

The Court: As far as you are concerned what?

The Defendant: As far as I am concerned this is still true. To me this case was simply a matter of conscription vs. freedom as guaranteed in the constitution. And I still believe in freedom and I still believe it is constitutional, and I don't believe Selective Service is.

The Court: We all believe in freedom, but the reason we have it, is because somebody else did submit themselves to the draft.

You are sentenced to the custody of the Attorney General for five years. That is all.

The Defendant: May I say something more?

The Court: I don't want to hear any more. You had your chance to talk, and you had it for days before.

(4) The Defendant: May I say something more?

The Court: What else do you want to say?

The Defendant: I would like to give you my argument.

The Court: I don't want an argument. I want to know why you shouldn't be sentenced. All you wish to discuss is your claim that the law is unconstitutional.

The Defendant: Are you going to give me a chance?

The Court: I don't want to hear any more about what is wrong with our law. I would add to what I just said, that this young man occupies a splendid job, really in

Government service, and I think he is wholly unappreciative both of the service and the country.

We will take our adjournment.

JUDGMENT AND COMMITMENT.

(Filed October 12, 1966.)

On this 7th day of October, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a finding of guilty by the Court after trial of the offense of having knowingly failed to report for induction into the Armed Forces of the United States after being so ordered by Local Board No. 11, Carrollton, Ohio, in violation of Title 50 Appendix, Section 456, 462, United States Code, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JAMES C. CONNELL, *Chief,*
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided February 8, 1968.)

Before O'SULLIVAN, PHILLIPS, and CELEBREZZE, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellant was sentenced to five years imprisonment for knowingly failing to report for induction into the armed forces, in violation of Title 50, U.S.C., App. §§ 456 and 462. No claim is made of any administrative unfairness or lack of procedural due process in the Selective Service Board's rulings. Appellant admits he knowingly failed to report, and defends solely on the ground that at the time he was ordered to report for induction (February 4, 1964) the draft law was unconstitutional in that it would have deprived him of his liberty and perhaps of his life without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. This is so, he says, because the Congressional purpose to provide for the common defense *could have been* accomplished by less drastic means than conscription if incentives for voluntary enlistment had been improved, chiefly by increased pay and opportunities for training.

A Judge of the United States District Court for the Northern District of Ohio, Eastern Division, to whom the case was tried, rejected the defendant's constitutional defense and his evidence bearing on alternatives to the draft, including speeches of members of Congress, a study by the Defense Department of the draft selection system, the expert testimony of an economist, and testimony by an Assistant Secretary of Defense before the House Committee on Armed Services. All of this, appellant asserted, would demonstrate that the manpower needs of the United States could have been satisfied by a wholly voluntary system

on the date in question, February 4, 1964. The remedy sought is for the case to be remanded to the trial court for a new trial, with direction to permit the defendant to subpoena in advance of trial relevant studies in the hands of the government and to place in evidence data bearing on the issue of the necessity for the draft. The trial judge would then, upon his evaluation of the evidence, determine whether or not conscription was reasonably necessary at the time of the defendant's alleged offense, and if not, would acquit the defendant on the ground that such lack of necessity rendered the draft law unconstitutional.

Appearing as amicus curiae, the American Civil Liberties Union urges on behalf of appellant that he should have "the right to attempt to prove unconstitutionality." On page 2 of its brief it is stated:

> "Amicus takes no position on the merits of the constitutional argument. We do not argue that the draft, on February 4, 1964, or on any other day, was constitutional or unconstitutional. * * *
>
> "Amicus does urge, however, that appellant should have had the right to challenge its constitutionality, which right was denied by the trial court's action in quashing subpoenas, denying motions for subpoenas, and refusing to hear relevant testimony in support of the claim of unconstitutionality. Accordingly, amicus' position here is essentially procedural."

We could agree that a litigant charged with disobedience of a Congressional Act should have "the right to attempt to prove unconstitutionality" of the Act in question. But if the evidence proffered to prove unconstitutionality would not in its totality and under a view most favorable to the defendant, prove unconstitutionality, the trial judge does not have to receive it. Appellant claims no other support for his challenge to the constitutionality of the draft

law than the asserted fact that on February 4, 1964, the day he refused to report for induction, the national defense could as well, or better, have been served by an army made up of volunteers, attracted to military service by better pay and better living conditions. He argues that had this system of providing for the national defense been in effect on or before the day appellant refused induction, February 4, 1964, there would have been no need to draft appellant Butler—therefore, to do so was an unconstitutional deprivation of his liberty. Stated in the language of appellant's statement of questions involved, his position is:

> "*The claim of lack of necessity* is founded on the proposition that at the time the defendant was ordered to be inducted, February 4, 1964, the military manpower procured by the draft *could have been* procured by voluntary means if incentives for enlistment had been improved, in the form chiefly of higher pay and better opportunities for training and education." (Emphasis added.)

In its amicus brief, the American Civil Liberties Union states the question as follows:

> "Is compulsory military service such a deprivation of individual liberty that the constitutional guarantee of due process under the Fifth Amendment *must permit a defendant who refuses to submit to induction to challenge the constitutional validity of the induction order on the grounds that at the time he refused to submit there was no overriding need of national security which could not be satisfied through less onerous means?*" (Emphasis added.)

Appellant does not claim that an army of the size then under arms was not necessary for the national defense on February 4, 1964, the day of his alleged offense. The army was brought into being by voluntary enlistments, and by

employment of the Universal Military Training and Service Act. The charge is that Congress should not have adopted conscription as one of the means of maintaining the needed army; it is not claimed that voluntary enlistments under the system then in force did provide, or could have provided, such an army. In his brief's address to us, appellant makes clear his position as follows:

> "First of all we must make it clear that *it is not suggested that the military forces of the United States were not needed or should have been smaller, less well trained, or less effective than they were in the period of the defendant-appellant's refusal of induction.* Indeed what is sought to be proved is that by improved pay and other incentives and by certain reasonable adjustments of organization, armed forces fully voluntary but at least equally effective and probably better trained and more efficient could have been provided. And if Congress had determined to preserve the Selective Service System as a stand-by mechanism for rapid increase of military manpower in event of necessity, that would not militate against the appellant's defense." (Emphasis added.)

At another place, the appellant states his position in this way:

> "*Appellant does not question the existence of the power to conscript when it is necessary.* We question only whether it was necessary at the time of the defendant-appellant's alleged violation of the Act." (Emphasis added.)

And in its amicus brief, the ACLU quotes from its January 30, 1966, statement of policy on "Military Conscription":

> "How can this statement of position be applied realistically in the context of the present draft system? *At the moment we see no constitutional, legal challenge*

that can be brought against conscription per se or the monthly drafts calls, but it is possible that an individual case may arise which might bring a civil liberties issue into focus. The major thrust, therefore *must come in the legislative forum,* an appropriate arena for debate on the need for a particular conscription."

We have read the appellant's exposition of the content of his proffered evidence. It consisted in the main of various statements by members of Congress, some excerpts from reports of studies made by the Department of Defense, and evidence that would have been given by an expert witness. Giving this data a view most favorable to appellant's defense, it was to the effect that Congress could have found a better way to raise an admittedly needed army than the system in force at the time appellant refused to report for induction. The Appellant's brief summarizes his proffered evidence as follows:

"It is clear that there is a substantial body of opinion among the members of Congress who have studied the draft that it would be highly desirable to abolish it and to rely upon a wholly volunteer force. None of them wants to weaken nor undermine the strength or quality of our national defense in the process, *and none states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.* (Emphasis added.)

"However, many of them point out that whatever increase in cost there might be in raising salaries in the armed forces to attract more volunteers would be at least partially offset by the economies of reducing turnover and thus reducing training cost, employing civilians or civilian contractors to perform more of the administrative and supply functions, delegating to civilian institutions the teaching of skills needed by the military that have civilian counterparts, and improving the efficiency of military operations in other

respects, such as by fitting assignments to abilities more closely.

"Many of the members of Congress point out that incentives other than increased pay can also be used to help attract volunteers. Among the suggestions are improved opportunities for education and the learning of job skills before, during and after military service; and improved recruiting and public relations activities.

"Many of the Congressmen believe it likely that by combining monetary and non-monetary incentives the increased costs of a wholly voluntary force could be kept within the limit of the savings that it and other economies could bring about, or at least that the net increase in cost would be modest."

The *better* alternative to the draft would consist primarily in raising the pay of the soldiers. One of the quoted Congressmen stated:

"Improvement in salary, living conditions, training, retirement benefits, opportunities for travel, and social status would make military service more attractive. It is clear that *at some level of expenditure* the armed services can attract all the men with the skills they need to keep our fighting machine in top shape. *The cost is not clear.*" (Emphasis added.)

Another of the Congressmen, advocating that one day we might get along with a totally voluntary system, said:

"During the Vietnam conflict a voluntary system is not feasible but we can pursue the goal."

To like effect, another stated, on June 28, 1966:

"We are now in an international crisis. No doubt the status of our existing military forces requires the draft."

A report of an Assistant Secretary of Defense on a study of the draft undertaken by the Department of Defense in April, 1964, contained the following:

> "A major objective of the study was to assess the possibility of meeting our military manpower requirements on an entirely voluntary basis in the coming decade.
>
> * * *
>
> "We found that elimination of the draft with no new incentives would make it impossible to sustain force levels of the size required *during the past sixteen years.*
>
> "The cost of sustaining an adequate all volunteer force would be prohibitive. The responses of the 16 to 19 year old group reveal that without a draft equal pay would be an adequate incentive to induce enlistment for only 4%. Considerably higher pay than in civilian life would induce enlistment by another 17%.
>
> * * * * *
>
> "In summary, it is *theoretically* possible to 'buy' an all-voluntary force at a cost ranging up to $17 billion, *depending upon unemployment conditions.* Other changes and techniques do not appear collectively to be able to meet the deficit anticipated under an all-voluntary force." (Emphasis added.)

There were some stronger expressions of support for an all-voluntary army than what we have set out above. However, appellant's own summing up of the opinions he relies on says, "*none* states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost."

Arrayed against this evidence which appellant proffered, is the statutory declaration by the Congress that "an adequate armed strength must be achieved and maintained to insure the security of this nation," and that:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." Title 50, U.S.C., App. § 451(c).

Congress then goes on to implement its declaration of need and purpose by enacting provisions for the draft as "a system of selection which is fair and just." The entirety of the provisions of the Universal Military Training and Service Act, 50 App. U.S.C. § 451, et seq, are but Congressional expression of its legislative judgment as to the need for the law it enacted.

We read, then, appellant's position to be that an issue of fact should be framed between his proffered evidence and the judgment of the Congress as to the necessity of the draft; this issue would then be submitted to a United States District Judge; the District Judge would have the power, upon his own evaluation of the evidence, to conclude that there was a better method of providing for the needed national defense than the one chosen by the national legislature. From this position he would move on to conclude that the availability of this better way rendered unnecessary and *therefore unconstitutional*, the method chosen by Congress.

We do not think the District Judge had any such power, and we agree with his refusal to entertain the contest presented by appellant. We affirm the judgment of the District Court.

We think that our conclusion so easily emerges from the foregoing recital that it requires little support from fresh dissertation and repetition of familiar law. We may concede that the Supreme Court has said that the war powers of Congress must be exercised within "Constitu-

tional limitations." *Hamilton v. Kentucky Distilleries & Warehouse Company,* 251 U.S. 146, 156, 64 L. Ed. 194, 199 (1919); *Galvan v. Press,* 347 U.S. 522, 530, 98 L. Ed. 911, 921 (1954). We observe that in *Galvan* the assertion of judicial power to control Congress' exercise of its war powers was dictum and in *Kentucky Distilleries,* the Supreme Court found no fault in the Congressional action there involved. We are cited to no case, nor does our research yield a case, that would support the proposition urged on us here, to wit: that a court has the power to review the decisions of the executive and the national legislature as to how to provide for the national defense, because the court thinks that it might be *possible* or *probable* that an all-voluntary army could be obtained by offering more pay and other perquisites to voluntary soldiers.

We think it sufficient to cite and quote from the following authorities: In the *Selective Draft Law Cases,* 245 U.S. 366, 62 L. Ed. 349 (1918), the Court, in holding conscription a valid exercise of Congressional power, said:

> "The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power 'to declare war, * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; * * * to make rules for the government and regulation of the land and naval forces.' Article I, § 8. And, of course, the powers conferred by these provisions, like all other powers given, carry with them as provided by the Constitution the authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' Article I, § 8." 245 U.S. at 377, 62 L. Ed. 353.

It is suggested by appellant that even though the Act now challenged was constitutional when enacted, the

District Judge could, upon the evidence we have reviewed above, determine that its constitutional validity did not remain to the date of appellant's disobedience of it. A like contention was made in the *Kentucky Distilleries* case. The Court replied:

> "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress. (citations omitted) Nor may the court inquire into the wisdom of the legislation. (citations omitted) *Nor may it pass upon the necessity for the exercise of a power possessed,* since the possible abuse of power is not an argument against its existence. *Lottery Case, Champion v. Ames,* 188 U.S. 321, 363." 251 U.S. at 161-62, 64 L. Ed. 202.

The Court then explained *Perrin v. United States,* 232 U.S. 478, 486, and *Johnson v. Gearlds,* 234 U.S. 422, 446, cases which had conceded arguendo that valid Acts of Congress may become invalid after enactment due to changed circumstances. Noting that the Acts were in both instances upheld, the Court said that "In each case the decision rested upon the ground that the question of what was reasonably essential * * * was one primarily for the consideration of the law-making body; that Congress was invested with a wide discretion; and that its action, unless purely arbitrary, must be accepted and given full effect by the courts." 251 U.S. at 163, 64 L. Ed. 202. It went on to say:

> "Conceding, then, for the purposes of the present case, that the question of the continued validity of the War Prohibition Act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that, *on obvious grounds, every reasonable intend-*

> *ment must be made in favor of its continuing validity, * * * that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded;* and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued." (Emphasis added.) 251 U.S. at 163, 64 L. Ed. at 202-203.

In the case of *Bertelsen v. Cooney,* 213 F(2) 275 (5th Cir. 1954), a doctor challenged the constitutionality of the section of the Universal Military Training Act authorizing the President to require special registration for military duty of doctors, dentists, and allied specialists. He contended the Act was unconstitutional because, *inter alia,* doctors were *not needed for present uses,* but only to create a future pool, because there were *already sufficient doctors* in the Medical Reserve Corps, and because *"the war powers of Congress are proportionate to the necessity for their exercise," and that they had been exercised in excess of such necessities.* Finally, he maintained that "the Act is 'arbitrary, unreasonable and unnecessary' in its provisions and enforcement to such an extent as to deny appellant due process under the Fifth Amendment." Id. at 276. The Court answered:

> "Petitioner concedes, as indeed he must in the light of the adjudicated cases, that under Art. I, sec. 8, of the Constitution, Congress has the power to raise and support armies, to maintain a Navy, and to draft personnel for service therein. This power exists in peace time as well as in war. *The power is plenary. It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed. These matters are confided to Congress*

and its agencies. United States ex rel. Goodman v. Hearn, 5 Cir., 153 F.2d 186; *United States v. Macintosh,* 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; *Falbo v. United States,* 320 U.S. 549, 64 S. Ct. 346, 88 L. Ed. 305; *United States v. Henderson,* 7 Cir., 180 F.2d 711; *United States v. Cornell,* D. C., 36 F. Supp. 81; *Warren v. United States,* 10 Cir., 177 F.2d 596; *Bronemann v. United States,* 8 Cir., 138 F.2d 333."

* * * * *

"[I]t was never intended to limit the war powers of Congress nor its right to exact public service from all when necessary to meet the public need, *Congress being the sole judge of the necessity and extent thereof. Heflin v. Sanford,* 5 Cir., 142 F.2d 798. Congress is expressly authorized to declare war and to provide for the common defense. These powers necessarily carry with them the power to say *who shall serve in the armed forces,* and in what circumstances." Id. at 276-78. (Emphasis added.)

We will not lengthen this opinion with further citations,[1] except to conclude with this observation of Chief Justice John Marshall in *McCulloch v. Maryland,* 4 Wheat 316, 421, 423, 4 L. Ed. 579, 605-606, (1819):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

* * * * *

"But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the

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[1] Interesting reading may be provided by recent articles in the American Bar Association Journal entitled "The Amazing Case of *Kneedler v. Lane*" and "A Judicial Revisitation Finds *Kneedler v. Lane* Not So 'Amazing'" appearing respectively, in the August and the December, 1967, issues of the Journal.

degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such power."

Judgment is affirmed.

JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered February 8, 1968.)

Appeal from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL D. REUSS,

Clerk.